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Barry Jipmon & Ors v Public Prosecutor

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HIGH COURT (KOTA KINABALU) — CRIMINAL APPLICATION NO BKI-44–15/11 OF 2020 (HC1)
WONG SIONG TUNG JC
8 DECEMBER 2020

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Criminal Procedure — Bail — Non-bailable offence — Applicants charged for murder — Whether there were reasonable grounds for believing that applicants were guilty of offence — Whether there was prima facie evidence in support of charge — Whether there was danger of applicants absconding — Whether there was exceptional or special circumstances — Criminal Procedure Code s 388(1)

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This was the applicants' application to be released on bail pending the completion of the trial in Criminal Case No BKI-46B-1/10 of 2020. The applicants were ten accused who had been jointly charged for the murder of Shainal bin Mukhtar ('the deceased'), under s 302 of the Penal Code ('Act 574') read with s 34 of the Act 574. By a notice of motion in encl 2, the applicants applied to be released on bail pursuant to s 388(1) of the Criminal Procedure Code (Act 593) and arts 5 and 8 of the Federal Constitution. In support of the application, the applicant's advocate asserted that after being transferred to Penjara Pusat Kota Kinabalu, the applicants' colleagues brought the deceased to seek medical treatment. It was asserted that on 4 October 2019, the deceased passed away in the cell at Penjara Pusat Kota Kinabalu due to encephalitis. The applicant's counsel further asserted that the applicants had never physically harmed the deceased at any time. The deputy public prosecutor denied the assertions in the affidavit filed to oppose the application.

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Held, dismissing the applicants' application:

(1) Though the advocate for the applicants affirmed that the facts as he deposed in his affidavit were within his personal knowledge and/or derived from the records of the applicants, it was not clear which of his assertions in respect of these matters were based on his personal knowledge and which were based on the alleged records and what these records were. The learned judicial commissioner did not think that much weight could be given to the assertions (see para 20).

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(2) In the circumstances, there were materials before the court that the prosecution would be able to produce as prima facie evidence in support of the charge against the applicants. The court was not required to examine the documents at the present stage of the proceeding. There were reasonable grounds for believing that the applicants had been guilty

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of the offence as charged. Section 388(1) of the (Act 593) prohibited any exercise of discretion to admit the applicants to bail (see paras 25–26).

(3) As to the assertion of the applicants' advocate by affidavit that the applicants were not flight risk, it was merely a general assertion and argument and were not based on any fact in precision with the personal knowledge. The offence that the applicants had been charged with were grave and the punishment was death. The learned judicial commissioner was not satisfied that there was no danger of the applicants absconding if released on bail. The applicants were prison officers and many of the witnesses of the prosecution appeared to be prison officers and the colleagues of the applicants. There was a danger of witnesses was being tampered with (see paras 33–36).

(4) Taking into account and giving due weight to all factors in favour and against the applicants, the court did not find any exceptional or special circumstances to allow the applicants to be released on bail. It was against public interest to do so. In any event, the court exercised its discretion in refusing to admit the applicants to bail (see paras 39–40).

[Bahasa Malaysia summary

Ini merupakan permohonan pemohon untuk dilepaskan dengan ikat jamin menantikan penyelesaian perbicaraan dalam Kes Jenayah No BKI-46B-1/10 Tahun 2020. Pemohon merupakan sepuluh orang tertuduh yang telah dituduh secara bersama untuk pembunuhan Shainal bin Mukhtar (si mati) dibawah s 302 of the Kanun Keseksaan (Akta 574) dibaca bersama s 34 Akta 574. Melalui satu notis permohonan dalam kandungan 2, pemohon memohon untuk dilepaskan dengan ikat jamin selaras dengan s 388(1) Kanun Prosedur Jenayah (Akta 593) dan per 5 dan 8 Perlembagaan Persekutuan. Dalam menyokong permohonan ini, peguam pemohon mengatakan bahawa selepas dipindahkan ke penjara pusat Kota Kinabalu, rakan sekerja pemohon membawa si mati untuk mendapatkan rawatan perubatan. Ianya dikatakan bahawa pada 4 Oktober 2019, si mati telah meninggal di sel Penjara Pusat Kota Kinabalu kerana *encephalitis*. Peguam pemohon turut menyatakan bahawa pemohon tidak pernah mencederakan secara fizikal si mati pada bila-bila masa. Timbalan pendakwa raya menafikan pengataan dalam afidavit yang difailkan untuk menentang permohonan.

Diputuskan, menolak permohonan pemohon:

(1) Walaupun peguam pemohon mengikrarkan fakta sepertimana yang dideposkan dalam afidavitnya merupakan dalam pengetahuan peribadinya dan/atau dari rekod pemohon, ianya tidak jelas pengataan beliau yang mana berkaitan dengan perkara tersebut berdasarkan pengetahuan peribadinya dan yang mana berdasarkan rekod dan apa rekod tersebut. Pesuruhjaya kehakiman terpelajar tidak berpendapat

bahawa nilai pemberatan yang tinggi boleh diberikan kepada pengataan tersebut (lihat perenggan 20).

(2) Dalam keadaan ini, wujud material dihadapan mahkamah yang boleh dikemukakan oleh pihak pendakwaan sebagai keterangan prima facie menyokong pertuduhan terhadap tertuduh, mahkamah tidak perlu meneliti dokumen tersebut di peringkat ini. Wujud alasan yang munasabah untuk mempercayai bahawa pemohon bersalah atas pertuduhan sepertimana dipertuduhkan. Seksyen 388(1) (Akta 593) melarang apa-apa pemakaian budibicara untuk memberikan ikat jamin kepada pemohon (lihat perenggan 25–26).

(3) Berkaitan dengan pengataan peguam pemohon melalui afidavit bahawa pemohon tiada risiko untuk melarikan diri, ianya hanyalah pengataan dan hujahan am sahaja dan bukannya berdasarkan apa-apa fakta secara tepat dalam pengetahuan peribadinya. Kesalahan yang telah dipertuduhkan kepada tertuduh adalah serius dan membawa hukuman mati. Persuruhjaya kehakiman terpelajar tidak berpuas hati bahawa tiada risiko pemohon akan melarikan diri sekiranya dilepaskan dengan ikat jamin. Pemohon merupakan pegawai penjara dan kebanyakan saksi pendakwaan merupakan pegawai penjara dan rakan sekerja pemohon. Wujud bahawa akan berlaku ganguan kepada saksi (lihat perenggan 33–36).

(4) Mengambil kira dan memberikan pemberatan kepada semua faktor yang memihak dan tidak memihak kepada pemohon, mahkamah tidak mendapati apa-apa keadaan khas atau luar biasa untuk membenarkan pemohon dilepaskan dengan ikat jamin. Ianya tidak bertepatan dengan kepentingan awam untuk berbuat sedemikian. Dalam apa keadaan sekalipun, mahkamah mengunakan budibicaranya untuk tidak membenarkan pemohon dilepaskan dengan ikat jamin (lihat perenggan 39–40).]

Cases referred to

Che Su binti Daud v PP [1978] 2 MLJ 162 (refd)
Hari Singh v Sundarammal [1965] 2 MLJ 174 (refd)
Leow Nyok Chin v PP [1999] 1 MLJ 437; [1999] 1 CLJ 647, HC (refd)
Lim Kiap Khee v PP [1988] 1 MLJ 198 (refd)
Ng Chong Hwa v PP [2018] MLJU 1781; [2019] 1 CLJ 823, HC (refd)
PP v Dato' Balwant Singh (No 1) [2002] 4 MLJ 427; [2002] 4 CLJ 155, HC (refd)
PP v Latchemy [1967] 2 MLJ 79 (refd)
PP v Arumugam a/l Nadeson and Others [2009] MLJU 739, HC (refd)
Regina v Ooi Ah Kow [1952] 1 MLJ 95 (refd)

Legislation referred to

Criminal Procedure Code ss 51A, 388(1), First Schedule
Federal Constitution arts 5, 8
Penal Code ss 34, 302

PJ Perira (Ariel Dasan, Hairul Vaiyron and Dominic Chew with him) for the applicants.
Khairuddin bin Idris (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Wong Siong Tung JC:

[1] The applicants are the ten accuseds who have been jointly charged for murder of Shainal bin Mukhtar, the deceased under s 302 of the Penal Code (Act 574) read with s 34 of the said Act in Criminal Case No BKI-46B-1/10 of 2020 which is pending trial.

[2] If convicted, the applicants faced punishment with death. It is a non-bailable offence under the First Schedule to the Criminal Procedure Code(Act 593).

[3] That means the applicants cannot insist to be released on bail as of right.

[4] By a notice of motion dated 18 November 2020 (encl 2), the applicants applied to be released on bail pending the completion of the trial in Criminal Case No BKI-46B-1/10 of 2020. The application is stated to be made under s 388(1) of the Criminal Procedure Code and arts 5 and 8 of the Federal Constitution.

[5] The relevant provision of the Criminal Procedure Code (Act 593) is s 388(1) which is reproduced as follows:

> 388 When person accused of non-bailable offence may be released on bail
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> (1) When any person accused *of any non-bailable offence* is arrested or detained without warrant by a police officer or appears or *is brought before a Court, he may be released on bail* by the officer in charge of the Police District or *by that Court, but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life:*
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> Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.

[6] Under s 388(1) of the Criminal Procedure Code (Act 593), it is in the

discretion of the court to determine whether the applicants should or should not be released on bail.

[7] However, under s 388(1), the court is prohibited to exercise such discretion in favour of the applicants if there appear reasonable grounds for believing that they have been guilty of the offence as charged. See: *Lim Kiap Khee v Public Prosecutor* [1988] 1 MLJ 198.

[8] The prohibition does not apply when person charged is under the age of sixteen years or any woman or any sick or infirm person accused under the proviso of s 388(1) of the Criminal Procedure Code (Act 593).

[9] The applicants are not relying of the proviso to s 388(1) of the Criminal Procedure Code (Act 593).

[10] To satisfy the court that there are in existence or seemingly reasonable grounds for believing that the applicants have been guilty of the offence charged, the prosecution is not required to adduced evidence to establish the guilt of the applicants beyond reasonable doubt.

[11] All that the prosecution has to do is to satisfy the court by some materials or evidence produced that it would be able to produce prima facie evidence in support of the charge against the applicants. See: *Che Su binti Daud v Public Prosecutor* [1978] 2 MLJ 162.

[12] It is the prosecution's ability to produce prima facie evidence in support of the charge the court is concerned.

[13] However, the mere fact that the applicants have been charged for the offence and that the prosecution was instituted with the consent of the public prosecutor is not sufficient to show the existence of such reasonable grounds.

[14] The court is not required to analyse any evidence tendered. There should not be any detailed examination of the evidence to avoid any form of prejudice to the parties. However, the court has to apply its mind to all the materials and any evidence available before it. See: *Public Prosecutor v Dato' Balwant Singh (No 1)* [2002] 4 MLJ 427; [2002] 4 CLJ 155.

[15] In support of the application to be released on bail in the instant case, none of applicants affirmed any affidavits.

[16] The materials in support of the application are contained in the affidavit affirmed and filed by one of their advocates, P Joseph Perira a/l TP

A Perira representing the applicants (encl 14).

[17] He made some general and vague assertions that prior to 4 October 2019, the deceased was detained at Kem Paradise, Kota Belud and his belief that the deceased had suffered physical injuries.

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[18] He asserted that after being transferred to Penjara Pusat Kota Kinabalu, the applicants' colleagues brought the deceased to seek medical treatment. Then it was asserted that on 4 October 2019, the deceased passed away in the cell at Penjara Pusat Kota Kinabalu due encephalitis.

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[19] He asserted that the applicants had never physically harmed the deceased at any time. The deputy public prosecutor denied these assertions in his affidavit filed to oppose the application.

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[20] Though the advocate for the applicants affirmed that the facts as he deposed in his affidavit are within his personal knowledge and/or derived from the records of the applicants, it is not clear which of his assertions in respect of these matters are based on his personal knowledge and which are based on the

E alleged records and what these records are. I do not think much weight can be given to the assertions. See: *Hari Singh v Sundarammal* [1965] 2 MLJ 174.

[21] On the other hand, the deputy public prosecutor has by his affidavit

F filed to oppose the application produced the Report of Post Mortem Examination of the Forensic Medicine Specialist, Hospital Queen Elizabeth, Kota Kinabalu in respect of the deceased. The report concluded that the cause of the deceased's death is 'sequalae (consequence) of multiple blunt force injuries in a man with encephalitis'.

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[22] Though the mere fact that the applicants were charged for the offence of murder is said to be insufficient to give rise to reasonable grounds for believing that the applicants have been guilty of the offence as charged, however the prosecution has also named in the charge sheet, 49 witnesses

H altogether to be called to prove the applicants' guilt.

[23] From the documents as furnished to the applicants' advocates under s 51A of the Criminal Procedure Code (Act 593), the prosecution has also established that there are evidence including reports, documents, CCTV

I recording etc to be used to prove the applicants' guilt.

[24] The applicants' advocates did not dispute that these documents were supplied and not even suggest that they were wholly incapable of proving the applicants' guilt.

[25] Thus, in the circumstances, there are materials before the court that the prosecution would be able to produce prima facie evidence in support of the charge against the applicants. The court is not required to examine these documents at this stage of the proceeding.

[26] In premises, there appears to me, reasonable grounds for believing that the applicants have been guilty of the offence as charged. That being the case, s 388(1) prohibits any exercise of discretion to admit the applicants to bail.

[27] Even if the materials before the court were not sufficient to show the existence of reasonable grounds for believing that the applicants have been guilty of the offence as charged, it does not mean that the applicants are automatically entitled to be released on bail.

[28] It remains in the discretion of the court. In the exercise of the discretion, it is the general principle of law that the discretion ought not to be exercised in cases punishable with death or life imprisonment except for exceptional and very special reasons. See: *Public Prosecutor v Latchemy* [1967] 2 MLJ 79; and *Regina v Ooi Ah Kow* [1952] 1 MLJ 95.

[29] The fact that the case attracted extensive media coverage does not amount to exceptional and very special circumstances.

[30] I cannot give much weight to the assertion of the applicants' advocate in his affidavit that the applicants were 'totally unable to assist in the preparation of their defence' with the current Covid pandemic and the assertion that applicants were not 'provided with the basic amenities to write' without stating precisely the basis of the assertions.

[31] The prison authority has stated that the applicants' advocates are permitted to communicate or meet with the applicants by means of online virtue or video conferencing by appointment.

[32] Though it may be inconvenient for the applicants to meet their advocates to prepare for their defence in the circumstances but it would be grave exaggeration to assert that they were not given any opportunity at all to meet and discuss with their advocates to prepare for their defence. The desire of the applicants for convenience is not a matter to be taken into account. See: *Leow Nyok Chin v Public Prosecutor* [1999] 1 MLJ 437; [1999] 1 CLJ 647.

[33] As to the assertion of the applicants' advocates by his affidavit that the applicants are not flight risk, it is merely his general assertion and argument and are not based any fact in precision within his personal knowledge.

[34] The offence that the applicants have been charged are grave and the punishment is death.

[35] I am not satisfied that there is no danger of the applicants absconding if released on bail. See:*Ng Chong Hwa v Public Prosecutor* [2018] MLJU 1781; [2019] 1 CLJ 823.

[36] The applicants were prison officers and many of the witnesses of the prosecution appeared to be prison officers and the colleagues of the applicants. There is a danger of witnesses being tampered with. See: *Public Prosecutor v Arumugam a/l Nadeson and Others* [2009] MLJU 739.

[37] The case has been fixed for pre-trial case management in January, 2021 and trial dates will be fixed.

[38] I also consider the contents of the Report of Post Mortem Examination concerning the deceased and the horrendous injuries inflicted upon him seemingly in the prison before he died.

[39] Taking into accounts and giving due weight to all factors in favour and against the applicants, I do not find any exceptional or special circumstances to allow the applicants to be released on bail. It is against public interest to do so.

[40] Thus, in any event, based on the materials and evidence before the court, I will exercise my discretion in refusing to admit the applicants to bail.

[41] I therefore dismissed the applicants' application by their notice of motion dated 18 November 2020 (encl 2).

Applicants' application dismissed.

Reported by Mohd Kamarul Anwar